

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

MARK POTTER, in his capacity  
as trustees of various  
irrevocable trusts,

Civil No. 07-244-AA  
OPINION AND ORDER

Plaintiff,

vs.

STEVEN BIGGS, THOMAS CROSSWHITE,  
and UNIQUE SETTLEMENTS, LLC, a  
foreign corporation,

Defendants.

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AIKEN, Judge:

Defendants jointly move to dismiss plaintiff's Third Amended Complaint alleging plaintiff failed to establish subject matter jurisdiction, pursuant to 28 U.S.C. § 1332; failed to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6); and failed to abide by this court's order dated November 19, 2007. Plaintiff has not filed an opposition to this motion. Defendant Thomas Crosswhite ("Crosswhite") moves to dismiss plaintiff's fourth cause of action for lack of subject matter jurisdiction and for failure to state a claim. Plaintiff opposes this motion. Defendants' joint motion to dismiss is denied and defendant Crosswhite's motion to dismiss plaintiff's fourth claim for relief is granted.

BACKGROUND

Plaintiff, allegedly a citizen of the State of Oregon, is the serving trustee of several trusts. Defendant Crosswhite is a citizen of the State of Utah. Defendants Steven Biggs ("Biggs") and Unique Settlements, LLC ("Unique") are citizens of the State

of Arizona. In this action, plaintiff obtained the services of Biggs and Unique to act as brokers to solicit and obtain offers from third-parties who desired to purchase life insurance policies held by each trust. Each trust was established to hold the life insurance policy or policies for at least 24 months. Thereafter, plaintiff had the option to sell each policy or policies to third-parties.

Plaintiff, acting as trustee for various trusts, decided to sell these policies upon the secondary market through defendants Biggs and Unique. Once sold, the net proceeds of each sale would be distributed to the trust pursuant to the terms of the trust. Plaintiff would then pay defendants Biggs and Unique a commission from the gross price offered by the purchaser. The commission, as agreed upon the parties, was 0.5% of the face amount of the policies held by each trust.

As is the custom and practice in the secondary market, defendants kept the names of potential buyers secret from plaintiff. As a result, plaintiff was dependent on defendant's representations regarding the offer or offers defendants had solicited for the purchase of each trust's insurance policy. Plaintiff, however, alleges that defendants Biggs and Unique fraudulently and negligently under-represented the amount of each offer to purchase each policy. In addition, plaintiff claims unjust enrichment against all defendants including defendant

Crosswhite, who allegedly received \$600,000 of net proceeds owed to plaintiff from Biggs and Unique.

On November 19, 2007, this court granted in part and denied in part defendants' joint motion to dismiss plaintiff's second amended complaint. Defendants' motion alleged plaintiff failed to establish diversity between the parties and failed to plead damages over the \$75,000 statutory minimum. Defendants' motion to dismiss was granted, however, plaintiff was allowed leave to amend his complaint to: (1) properly allege citizenship in the State of Oregon; (2) include a "short and plain" statement, pursuant to Fed. R. Civ. P. 8(a)(1), of plaintiff's claims supporting defendant Biggs' liability on an alter ego or piercing the corporate veil theory; and (3) properly allege that the same operative facts are present for each trust and transaction to support plaintiff's \$75,000 statutory minimum subject matter jurisdiction requirement.

#### STANDARDS

Under Fed. R. Civ. P. 12(b)(6), once a claim has been stated adequately, it may be supported by "showing any set of facts consistent with the allegations in the complaint." Bell Atlantic Corp. v. Twombly, \_\_\_\_ U.S. \_\_\_\_, 127 S.Ct. 1955, 1960 (2007). See also, Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985). For the purpose of the motion to dismiss, the complaint is liberally construed in

favor of the plaintiffs, and its allegations are taken as true. Rosen v. Walters, 719 F.2d 1422, 1424 (9th Cir. 1983).

DISCUSSION

1. Defendants' Joint Motion to Dismiss Third Amended Complaint.

First, plaintiff was allowed to amend his complaint to properly allege citizenship in the State of Oregon. Plaintiff did so. See Third Amended Complaint, ¶ 1. Defendants no longer dispute plaintiff's citizenship. Second, plaintiff was granted leave to amend his complaint to include a "short and plain" statement of his claims supporting defendant Biggs' liability on an alter ego or piercing the corporate veil theory pursuant to Fed. R. Civ. P. 8(a)(1). Plaintiff added the following language to his complaint:

9.

Though Biggs operated through this LLC at all times plaintiff was contracting for Biggs' special knowledge, contacts and abilities. What plaintiff sought and what plaintiff bargained for was Biggs's personal abilities. Because plaintiff had to contract with Unique to obtain Biggs's services plaintiff did so. But for this plaintiff would only have contracted with Biggs.

10.

Unique was under the actual and exclusive control of Biggs at all times material to this complaint.

Third Amended Complaint, ¶¶ 9, 10.

Parties are allowed to amend their complaint to specifically advance the theory that a sole shareholder is individually liable. See, e.g. Holley v. Crank, 386 F.3d 1248, 1257 (9th

Cir. 2004), amended Holley v. Crank, 400 F.3d 667 (9th Cir. 2005). Defendants argue that plaintiff's theory is improper because the LLC has only one member. Def. Reply Memo., p. 5. Regardless, plaintiff's claim survives a Fed. R. Civ. P. 12(b)(6) challenge if that one member has actual and exclusive control of the LLC at all times. Plaintiff has alleged exactly those facts in his third amended complaint. At this stage of the proceedings, plaintiff complies with Rule 8(a)(1) and adequately supplies a "short and plain" statement alleging that Biggs, as sole member of Unique, is liable under the piercing the corporate veil theory for alleged violations of fraudulent and negligent misrepresentation.

Finally, plaintiff was allowed to amend his complaint to properly allege that the same operative facts are present for each trust and transaction to support plaintiff's \$75,000 statutory minimum subject matter jurisdiction requirement. There is no dispute that the jurisdictional requirement has been met for three of the fourteen trusts of which plaintiff is Trustee. Therefore, this court has original jurisdiction over these three trusts.

Regarding the remaining eleven trusts, plaintiff asserts supplemental jurisdiction. See 28 U.S.C. § 1337. This court has discretion to retain jurisdiction over the remaining claims brought by the other trusts pursuant to supplemental

jurisdiction. See Herman Family Revocable Trust v. Teddy Bear, 254 F.3d 802, 805-06 (9th Cir. 2001). Plaintiff amended his complaint as follows in response to this court's order:

25.

Plaintiff's losses due to defendants' conduct as to the Elva Gould, Richard Gould (Trust II), and Gustav Hertrich trusts each exceed this court's jurisdictional limit. With respect to each and every trust, including those trusts as to which Plaintiff's losses are less than \$75,000 per trust, Defendants' wrongful conduct was the same. Thus, the same set of operative facts gives rise to each claimed loss. In each case Defendants mis-represented the amount of the offer so as to keep some of the funds for themselves which by agreement should instead have gone to Plaintiff.

Third Amended Complaint, ¶ 25.

Defendants argue that there are no allegations that the same misrepresentations were made by the same defendants to the various people who control the trusts at issue. Def. Reply Memo., p. 7. I disagree. In plaintiff's amended complaint, he specifically stated that in every occasion "[d]efendants mis-represented the amount of the offer so as to keep some of the funds for themselves which by agreement should instead have gone to [p]laintiff." Third Amended Complaint, ¶ 25. As such, plaintiff argues that this court should exercise supplemental jurisdiction over the remaining eleven claims made by each trust.

Supplemental jurisdiction may be declined by a federal district court "only if the state law claim is predominant, if it is novel or complex, if all federal claims have been dismissed, or if other 'compelling' reasons exist." Ram Technical Servs.,

Inc. v. Koresko, 215 Or. App. 449, 459, 171 P.3d 374 (2007) (citing 28 U.S.C. § 1367(c); and Executive Software v. U.S. Dist. Ct., 24 F.3d 1545, 1555-56 (9th Cir 1994)). In addition, federal district courts have supplemental jurisdiction over state claims that are "so related" to the federal claims before them "that they form part of the same case or controversy." 28 U.S.C. § 1367(a).

With the enactment of 28 U.S.C. § 1367, federal courts now have broader discretion to retain jurisdiction over state claims than under United Mine Workers v. Gibbs, 383 U.S. 715 (1966). See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988). See also Harrell v. 20th Century Ins. Co., 934 F.2d 203, 205-06 (9th Cir. 1991). Cohill emphasized that federal courts should handle cases involving state law claims that will "best accommodate the values of economy, convenience, fairness, and comity." 484 U.S. at 351.

Although the specific facts to each transaction and trust might be different, the operative fact that defendants allegedly misrepresented offers to purchase life insurance policies to plaintiff, as trustee of each trust, is similar for all of the proceeds allegedly due to each trust. Therefore, this court exercises its discretion, pursuant to 28 U.S.C. § 1367, over the remaining eleven trusts. I see no reason to decline jurisdiction under any one of the four factors stated in 28 U.S.C. § 1367(c).

Therefore, defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (1) for lack of subject matter jurisdiction and 12(b) (6) for failure to state a claim is denied.

2. Defendant Crosswhite's Motion to Dismiss

Defendant Crosswhite moves to dismiss plaintiff's fourth cause of action for lack of subject matter jurisdiction and for failure to state a claim. In his complaint, plaintiff claims relief for unjust enrichment in the amount of \$600,000 that defendant Crosswhite received from defendants Biggs and Unique who wrongfully obtained such money that allegedly belonged to plaintiff. Plaintiff asserts that "Biggs and Unique gave Crosswhite money that belongs to Plaintiff, that Plaintiff's rights to that money are superior to Crosswhite's, and that Plaintiff is entitled to recover those ill-gotten gains from Crosswhite." Plaintiff's Response to Def. Crosswhite's Motion to Dismiss, p. 2.

Plaintiff now asserts that his fourth claim for relief is for the "common count of money had and received" rather than for unjust enrichment. Id. Therefore, Crosswhite's motion to dismiss on this ground is granted. Plaintiff, however, is granted leave to amend his complaint to include a "short and plain" statement of his claims supporting defendant Crosswhite's liability on a common count of money had and received theory. The court notes this will be plaintiff's fourth attempt at

amending his complaint. The court will not allow any further amendments.

CONCLUSION

Defendants' joint motion to dismiss plaintiff's third amended complaint (doc. 29) is denied. Defendant Crosswhite's motion to dismiss plaintiff's fourth claim for relief (doc. 31) is granted. Any amended complaint must be filed by March 17, 2008. Finally, defendant Crosswhite's request for oral argument is denied as unnecessary.

IT IS SO ORDERED.

Dated this 2 day of March, 2008.

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/s/ Ann Aiken  
Ann Aiken  
United States District Judge

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